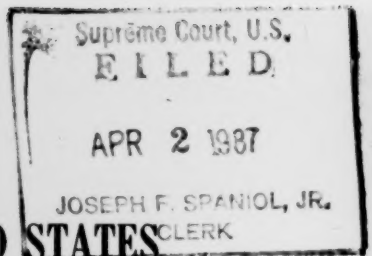


86 No. 1590



IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OF AMERICA

October Term, 1986

NOVINGER, KEVIN and NOVINGER, DARLENE,  
*Petitioner*

*v.*

STEVEN M. KRAMER, ESQ.  
CHARLES J. GEFFEN, ESQ.  
LEE C. S. SWARTZ, ESQ.

*Respondents in No. 86-5216*

WILLIAM T. SMITH, ESQ.  
*Respondent in No. 86-5248*

On Writ of Certiorari to the United States  
Court of Appeals for the Third Circuit  
(Appeal Nos. 86-5216 and 86-5248)

**PETITION FOR CERTIORARI**

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## QUESTIONS PRESENTED

1. May an appeals court repudiate the factual findings of a trial court regarding a claim for attorneys fees on the basis that no special mandatory fee hearing was held?

2. Was the trial court's rejection of the claims for attorney fees unreasonable based on substantial fact of record?

3. Is an attorney who has been given adequate opportunity to submit any documentation deemed relevant by himself to an attorneys fee claim to be heard by briefs on his claim for attorneys fees to be also entitled to an additional mandatory court hearing in order to constitute due process?

4. Did the Circuit Court err in overturning the District Court's fact finding and legal conclusions as to the termination of the agreements between the plaintiffs below and their former counsel, Smith and Swartz?

5. Did the trial court properly exclude from plaintiff Kramer's claim for attorney's fees any fees related to services provided before December 7, 1978 and any fees for Mr. Geffen?

## LIST OF ALL PARTIES

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KEVIN NOVINGER and DARLENE NOVINGER,  
*Petitioners*

*v.*

E. I. duPONT de NEMOURS & CO., INC.,  
MERCEDES-BENZ OF NORTH AMERICA, INC.,  
DAIMLER-BENZ ANTIEN GESELLSCHAFT GLASURITE  
GmbH, BASF FARBER & FASERN AG and  
GENERAL MOTORS CORP.

*v.*

LESONAL WERKE and DR. KURT HERBERTS CO. GmbH,  
ORIGINAL IMPORTS, INC. and RICHARD-YALE  
INDUSTRIES, INC.

*Defendants Below*

STEVEN M. KRAMER, ESQ., CHARLES J. GEFFEN, ESQ.  
LEE C. SWARTZ, ESQ. and WILLIAM T. SMITH, ESQ.

*Respondents.*

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THE UNIVERSITY OF CHICAGO

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October Term, 1986

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NOVINGER, KEVIN and NOVINGER, DARLENE,  
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STEVEN M. KRAMER, ESQ.  
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**PETITION FOR CERTIORARI**

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**OPINIONS BELOW**

THE OPINIONS DELIVERED IN THE COURTS BELOW WERE:

1. Novinger, Kevin and Novinger, Darlene v. E.I. duPont de Nemours Co., Inc., et al., NOS. 86-5216 and 86-5248 (3d Cir. January 15, 1987)

2. Novinger, Kevin and Novinger, Darlene v. E.I. duPont de Nemours Co., Inc., et al., Civil Action No. 79-1188

### **JURISDICTION**

The date of the District Court's Order in

Novinger v. E.I. duPont de Nemours Co., Inc., et al. was March 26, 1986. The date of the Circuit Court opinion was January 15, 1987.

The jurisdiction of this Court to review this case on petition for certiorari rests upon 28 U.S.C. Sec. 1254(1).

### **STATUTES INVOLVED**

1. 28 U.S.C. Sec. 1291
2. 39 U.S.C.A. Sec. 1001
3. 39 U.S.C.A. Sec. 1001(b)

### **STATEMENT OF THE CASE**

The petitioners and plaintiffs below, Kevin and Darlene Novinger, initiated a diversity products liability action in 1979 after Kevin Novinger was harmed from occupational exposure to spray paints manufactured by defendants below, E.I. DuPont de Nemours & Co., Inc., Mercedes-Benz of North America, Inc., Daimler-Benz Antien Gesellschaft, Glasurite GmbH, BASF Farber & Farsern AG, General Motors Corp., Lesonal-Werke, Dr. Kurt Herberts Co. GMBH, Original Imports, Inc. and Richard-Yale Industries, Inc. Jurisdiction in the District was thus invoked under 28 U.S.C. Section 1332.

In pursuing their case, the Novingers encountered many obstacles, most of which were caused by the actions of their own attorneys. Several of these attorneys have made claims for fees, after relinquishing their rights to such fees, and their petitions were studied by the District Court. Their claims rebuffed by that court, these attorneys then appealed to the circuit court, which

reversed the lower decision and remanded for hearing. In petitioning this Court, the Novingers are presenting questions which will lead to a determination of:

- the obligation of clients to attorneys seeking fees but who abandoned the clients after failing to pursue the clients' claims, to the point that the judge was on the verge of dismissing the case due to lack of prosecution, and
- the extent to which a trial court judge is entitled to oversee the relationship between attorneys and their clients in the context of a diversity products liability case before that judge.

In order to present a framework for answering these questions, a brief chronology is provided.

Initially, the Novingers contacted F. Lee Bailey of Boston, a leading practitioner who has a national reputation. Mr. Bailey, who has never had a contract with the Novingers, apparently only told them to call Richard Sprague, the noted former Philadelphia district attorney and sometime special federal prosecutor. Mr. Sprague, in turn, apparently sent the Novingers to his suite-mates, the separate law firm of Lewis & Kramer, whose senior partner Mr. Alvin Lewis, had also been in the district attorney's office.

There were at least four written contracts between the Novingers and the law firm of Lewis & Kramer. Two of these four contracts also refer to Mr. Sprague as co-counsel, the others do not mention Mr. Sprague. Mr. Bailey, while not on any Lewis & Kramer contract, was listed as co-counsel in some pleadings and given a one-third contingency in the fees recovered by Lewis & Kramer. There is no evidence that Mr. Sprague or Mr. Bailey have done any substantial work on this case.

In any event, the Novingers called Lewis as per Sprague's referral. Mr. Lewis said that, while he was in charge, his young associate, Steve Kramer (apparently

his "partner," not "associate") would handle the workmen's compensation aspect of the case. Thereafter, the firm entered the pending worker's compensation case.

Before Mr. Kramer and Mr. Lewis formally dissolved their partnership, Mr. Kramer called the Novingers and, in words, said that he could handle the case better than Lewis, that Lewis was playing politics, and that Lewis was selling Kevin Novinger out. The Novingers accepted these probably improper representations, and hired Attorney Kramer. At or about January 1979, two products liability suits were filed by Mr. Kramer and Mr. Bailey, one in state court and one in the federal court for the Eastern District, which was then transferred to the Middle District.

Kramer had a new contract prepared on April 11, 1979. Messrs. Bailey, Sprague and Lewis apparently withdrew entirely. Then, in contravention of his contractual authority, Kramer associated Charles Geffen, who has no contract with the Novingers, to assist him on the case. In his agreement, Kramer unethically but effectively waived the Novingers' personal obligation to him for any costs. The agreement also taints these gentlemen with unclean hands.

Mr. Kramer had various problems with the Novingers: he never could be found; he missed a workmen's compensation hearing on April 28, 1978, causing a dismissal; he failed to answer discovery in a parallel state court action, causing the Court to place a lien on the Novinger home to pay for associated costs; he allegedly failed to give the Novingers the reimbursement money from defense counsel to reimburse the Novingers for the Court-ordered medical exam before Dr. Karp; he failed to prepare the case or develop a theory.

Regardless, he was fired repeatedly, eventually prompting a July 21, 1980 mailgram firing. Kramer still, for about a year, refused to release files, despite Court Orders and client pleas to the contrary. He claimed he

was "puzzled," but nevertheless still "protecting" the Novingers' interests by staying in the case. As indicated below, Kramer's conduct, with the apparent approval of Geffen, served to needlessly protract and lengthen this litigation in direct contravention of the requirement of Title 28, U.S.C. Sec. 1927 and Rule 11, F.R.Civ.P.

William Smith, who had a contract, was hired in December of 1980, despite Mr. Kramer's refusal to release the Novinger file. Apparently, Mr. Smith did not feel competent to handle the case. He brought in Lee Swartz on February 10, 1981, to "take over the management strategy and become in effect, lead counsel in the case." The clients refused to sign the additional retainer agreement repeatedly tendered by Lee Swartz, and he knew it. However, and it is Mr. Swartz who defines this document as an important one, Mr. Swartz expressly indicates and admits that there is no new obligation to him from the clients, but only the old Smith-Novinger contract.

The team of Smith and Swartz immediately offended clients by virtue, *inter alia*, of Smith's sexual harassment of Darlene Novinger, and their lack of work, a fact later confirmed by Attorney Desfor. More important, they did a poor enough job that they later felt it necessary to ask Bruce Desfor to have clients to sign an alleged "Release" for them from all liability to the Novingers as a condition of their secret deal.

Briefly, Swartz told Desfor that Desfor could have the Novinger case if a number of non-negotiable conditions were met. Specifically, Swartz wanted the clients to release Smith and Swartz from malpractice liability in consideration for waiving claim to their past time and effort. Whether this was a good bargain, and whether any attorney was exercising independent judgment exclusively on behalf of the Novingers, it can not be denied that the consideration offered was a sham in two senses.

First, and without disclosure to clients, Smith and Swartz were getting a 50% kickback from Desfor. Obviously, Smith and Swartz really were not giving up their fee. Second, Smith and Swartz now come into Court, ignoring their so-called Release, as well as their contract, lack of contract, and secret deal with Desfor.

Accordingly, when Attorney Smith filed a motion to withdraw, which was granted by the Court, in favor of Bruce Desfor, who had a contract, there was undisclosed the fact that he had a deal with Messrs. Desfor and Swartz. The deal thus was that Desfor would share his fees with Smith and Swartz on a 50-25-25 basis. At the same time, Desfor was able to obtain from the clients a signed "Release" of all malpractice liability against them in return for a waiver of any fees and costs. In short, *Smith and Swartz have settled out their fee and cost claims with clients.*

Mr. Desfor did work with Mr. Swartz, who the clients still would not sign with. Mr. Desfor found the files to be in terrible shape with almost no substantive information.

After Desfor and Swartz, Angino & Rovner came in with a contract, but then withdrew immediately. Apparently, they had no problem with the Novingers; their problem was with the state of the files.

Allan Kanner, John O'Brien and H. Clark Connor then entered their appearance in this case on July 22, 1985, and brought it to trial and successful settlement in February, 1986.

Shortly after settlement was reached, Attorney Kramer moved for an order determining counsel fees due to him and Geffen pursuant to an earlier District Court order. The District Court then sua sponte ordered that any attorney wishing to request counsel fees should do so. Motions were then filed on behalf of Swartz and Smith. Kramer then sought an order preventing disbursement of the settlement fund pending resolution of the dispute over attorney fees. On March 26, 1986 the

district court, without a hearing, issued an order which: (1) denied defendants motion to pay the settlement monies into the court; (2) denied Kramer, Geffen, Smith and Swartz' motion for fees and costs; and (3) compelled defendants to pay the settlement to the plaintiffs and attorney Kanner.

The attorneys appealed to the Third Circuit. That court made new findings of fact then reversed the district court's order and remanded for a hearing to determine the contractual rights of the attorneys to fees and/or costs. It is this decision that plaintiffs seek to have reviewed before this Court.

**I. MAY AN APPEALS COURT REPUDIATE THE FACTUAL FINDINGS OF A TRIAL COURT REGARDING A CLAIM FOR ATTORNEY FEES ON THE BASIS THAT NO SPECIAL MANDATORY FEE HEARING WAS HELD?**

**Introduction:**

In the case below, the trial court considered and rejected fee applications by Kramer-Geffen and Smith-Swartz. There is no dispute that the trial court presided over this case and allowed due opportunity for submission of whatever documentation applying counsel felt appropriate. Plaintiffs filed extensive documentation in opposition, attacking these submissions. The court found that the Kramer-Geffen and Smith-Swartz fee applications were not meritorious based on the four corners of the document and the trial judge's prior experience with the case. Upon review, the court of appeals erroneously assumed that absent a mandatory hearing the trial court's findings of fact were worthless.

### Argument:

The fact that no special evidentiary hearing was held after petitioning counsel filed their fee requests but before a decision was rendered does not affect the outcome. The judge still acted as fact finder and her decision with respect to claimant's motion is entitled to the same 'clear and erroneous' standard since the policy endorsing the finality of judicial decisions is still present. The third circuit established the appellate scope of review to be applied to directed verdicts in *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, *cert. denied*, 451 U.S. 911 (3d Cir. 1980) where it was stated that

[t]he appellate court must consider the records as a whole and in the light most favorable to the non-moving party, drawing all reasonable inferences to support its contentions. If no reasonable resolution of the conflicting evidence and inferences therefrom could result in a judgment for the non-moving party, the appellate court must affirm the lower court's decision.

*Sweeney*, 637 F.2d at 115. See also *In re Fine Paper*, 685 F.2d 810, 34 Fed.R.Serv.2d (Callaghan) 513, 1982-2 Trade Cas. (CCH) P64, 843, *cert. denied*, 459 U.S. 1156, 103 S.Ct. 80, 74 L.Ed.2d 1004 (1982).

The district court's consideration of evidence that consists of documents and "inferences from other facts" is entitled to the same discretionary review under Fed.R.Civ.P. 52(a) as when the evidence entails oral testimony. *Anderson v. City of Bessemer City, North Carolina*, — U.S. —, 105 S.Ct. 1504, 1507, 84 L.Ed.2d 518 (1985). And when the district court has lived with the controversy over an extended portion of time, the appellate court's review will rely more on the presumption of

the correctness of the lower court's decision. *Bose Corporation v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502, *rehearing denied*, — U.S. —, 104 S.Ct. 3561 (1984).

<sup>1</sup> The Court of Appeals applied an incorrect standard of review in not applying the clearly erroneous standard to the factual determinations of the District Court.

The circuit court's determination in the instant case represents a scope of review outside the authority vested in it by Congress to review district court decisions. The proper scope of appellate review consists of determinations of errors of law, violations of the Constitution and whether the factual conclusions of the lower court are 'clearly erroneous'. *U.S. v. Singer Mfg. Co.*, 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963), F.R.Civ.Proc. 52(a), 28 U.S.C. It must be shown that there was fraud perpetrated on the trial court, with all doubts being resolved in favor of the finality of the judgment. *Bulloch v. U.S.*, 763 F.2d 1115 (10th Cir. 1985).

Insofar as a lower court's conclusion is based on "inferences drawn from documents or undisputed facts . . . Rule 52(a) of the Rules of Civil Procedure is applicable." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 394, 68 S.Ct. 525, 541, 92 L.Ed. 746, *rehearing denied*, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948). The rule there stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *U.S. Gypsum*, 333 U.S. at 395. See also *Guzman v. Pichirilo*, 369 U.S. 698, 82 S.Ct. 1095 (1962) and *Sumrall v. Resolute Insurance Co.*, 377 F.2d 671 (5th Cir. 1967).

While the appellate court may review the entire record before deciding whether the correct decision was reached below, the fact finder's conclusions "will be affirmed if the result is correct even if the lower court relied upon the wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 82 L.Ed.

224 (1937), and *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). Also see *Wan v. Esperdy*, 321 F.2d 123 (2d Cir. 1963), where the court held that the lower district court decision could be reversed only if "arbitrariness or caprice" was involved. *Id.* at 126.

This court emphasized that an appellate court may not reverse a district court's evidentiary findings if they are "plausible in light of the record viewed in its entirety," even if the reviewing court would have come to different conclusions if it had been the fact finder. *Anderson v. City of Bessemer City, North Carolina*, — U.S. —, 105 S.Ct. 1504, 1507, 84 L.Ed.2d 518 (1985). To allow an appellate court to act as fact finder would controvert the no-nonsense impact that F.R.Civ.P. 52(a) was meant to have. "The district court's authority to decide factual issues is just that: authority." *Scandia Down v. Euroquilt, Inc.*, 772 F.2d 1423, cert. denied, — U.S. —, 106 S.Ct. 1801 (7th Cir. 1985).

In *Scandia Down*, a case involving alleged trademark infringement, the court there stated the policy behind F.R.Civ.P. 52(a):

. . . because appellate courts are never in a better position than the district court, and often are in a worse one, a substitution of judgment would increase the randomness of the process without increasing accuracy . . .

*Scandia Down*, 772 F.2d at 1428. Every judge will have his or her own individual view to bring to a fact situation and "[i]t would be little short of arrogation for an appellate court to claim that . . . the appellate judge's view must be the right one." *Id.* at 1429.

The Third Circuit has itself recognized the role that judicial discretion plays when the appellate court must decide on the finality of a district court decision. When the applicable standard of judicial review is a light one,

as is the clearly erroneous standard, the lower court decision is entitled to a fair degree of insulation from reversal above. This concept of discretion allows the fact finder some room for error without being reversed. *U.S. v. Schiavo et al.*, 504 F.2d 1, 375 F.Supp. 475, *cert. denied*, 419 U.S. 1096 (3d Cir. 1974).

The Third Circuit Court of Appeals went beyond the clearly erroneous standard of review in considering and then overturning the factual determinations of the District Court.

## II WAS THE TRIAL COURT'S REJECTION OF CLAIMS FOR ATTORNEY FEES UNREASONABLE BASED ON THE SUBSTANTIAL FACTS OF THE RECORD?

As the court that presided over the litigation for which fees are at issue and reviewed the detailed submissions of counsel, the trial court and not the appellate court is particularly well-suited to weigh the factual merits of the claim. *Anderson v. City of Bessemer City, North Carolina*, — U.S. —, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). Insofar as the trial court's findings were inference drawn from these documents, undisputed facts, or its knowledge of the case, the applicable federal rule is that findings of fact shall not be set aside unless clearly erroneous. *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746, *rehearing denied*, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948).

Factual determinations by a trial court fail the clearly erroneous standard if and only if there is "complete absence of probative facts" supporting the court's conclusion. *Lavender v. Kern*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1949). Once the requisite support is found, the appellate court's review function is finished. *Lavender*, 327 U.S. at 653.

In those specific situations where factual conclusions must be made with regard to attorneys fees, the

district court is not limited to those circumstances existing at the time the fee agreement was executed. *McKenzie Construction Inc. v. Maynard*, 758 F.2d 97, 101 (3d Cir. 1985). The policy underlying this rule is that attorney fee agreements are not to be evaluated the same as are ordinary commercial contracts. *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1108 (3d Cir. 1979). The third circuit has extended the review of such contracts to the (1) results obtained by the attorney, (2) the quality of the service, and, especially important in the instant situation, (3) whether the attorney's efforts "substantially contributed" to the outcome of the litigation. *Dunn*, 602 F.2d at 1110. See also *McKenzie Construction, Inc. v. Maynard*, 758 F.2d 97, 101 (3d Cir. 1985).

The district court below outlined this three part test and applied it to determine the reasonableness of Kramer's request. The court properly considered, not only the affidavits of the attorneys claiming counsel fees, but also the court filings of current attorneys and correspondence relevant to the claimant attorneys' services in the case below, as all of this information impacts on the reasonableness of the attorneys' claims. *McKenzie Construction Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985), *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105 (3d Cir. 1979), *Krause v. Rhodes*, 640 F.2d 214 (6th Cir. 1981).

The court is not under a duty to expand the record beyond documentary evidence in order to constitute substantial facts on the record to pass a clearly erroneous standard of review; the generally accepted rule is that the judge sitting as fact finder is "permitted to appraise the legal services of counsel without . . . any testimony on the subject." *Stanolind Oil and Gas Co. V. Guertzen*, 100 F.2d 299, 302 (C.C.A. Mont. 1938). See also 4A C.J.S. Appeal and Error Sections 1093, 1094 (1957) and 7A C.J.S. Attorney and Client Section 191 (1980). Moreover, the court is not bound by the opinions of the attorneys as to the value of their service, but rather to a certain degree should exercise its own judgment as to

their value since the court has the requisite skill and knowledge to determine reasonable compensation. *Colton v. Coffey*, 187 Ill. App. 558 (1914).

In reaching its decision, the district court had before it all the documentary evidence pertaining to Kramer's services in the action below, as submitted by Kramer himself. In an action for fees, the primary evidence is bound to consist of timesheets and hourly charges and other accounting documentation, which Kramer provided.

The District Court's factual determinations were therefore based on a record of documentation sufficient to support that court's conclusion.

**III. IS AN ATTORNEY WHO HAS BEEN GIVEN ADEQUATE OPPORTUNITY TO SUBMIT ANY DOCUMENTATION DEEMED RELEVANT BY HIMSELF TO AN ATTORNEYS FEE CLAIM TO BE HEARD BY BRIEFS ON HIS CLAIM FOR ATTORNEY FEES ALSO ENTITLED TO AN ADDITIONAL MANDATORY COURT HEARING IN ORDER TO CONSTITUTE DUE PROCESS?**

What constitutes due process depends on the particular facts and circumstances of a case. *Lewis v. Hill*, 457 F.Supp. 1112, vacated 611 F.2d 464 (D.C. Pa. 1978). It does not necessarily require a "trial type" hearing or the opportunity to confront and examine witnesses. 39 U.S.C.A. Sec. 1001, 1001(b), *Winston v. U.S. Postal Service*, 432 F.Supp. 1117, affirmed, 585 F.2d 198 (7th Cir. 1977); *Hogan & Hartson v. Butowsky*, 459 F.Supp. 796 (S.D.N.Y. 1978); *Hollenbaugh v. Carnegie Free Library*, 436 F.Supp. 1328, affirmed, 578 F.2d 1374, cert. denied, 439 U.S. 1052, 99 S.Ct. 734, 58 L.Ed.2d 713, rehearing denied, \_\_ U.S. \_\_, 100 S.Ct. 186 (1977). Indeed, if one considers all of the contexts in which mandatory trial-type hearings are not required by

due process, it is an outrage that lawyers looking for fees get more due process than ordinary citizens.

The trial judge's familiarity with the facts and circumstances should be a factor when reviewing that judge's discretion in deciding that due process did not require an oral hearing. *Stanolind Oil and Gas Co. v. Guertzgen*, 100 F.2d 299 (C.C.A. Mont. 1938), 4A C.J.S. Appeal and Error Sections 1093, 1094 (1957), and 7A C.J.S., Attorney and Client Section 191 (1980). Judge Rambo is intimately familiar with the long and somewhat tortured history of this case and the changing relationship between the plaintiffs, Mr. and Mrs. Novinger, and their succession of attorneys. Having presided over this suit for eight years, including the trial of the case, Judge Rambo is in the best position to decide the relative merits of the claimant attorneys. Her decision to decide the fee question on the papers submitted without an oral, trial-type hearing was made after having seen affidavits and other written evidence from the attorneys and after having had the opportunity to make first hand observations of their alleged contribution to the Novinger's case.

Moreover, in denying the attorneys an oral hearing, the trial judge was following accepted Pennsylvania law and practice as delineated in *Wargo v. Wargo*, 191 Pa. Super. 10, 155 A.2d 423 (1959), where the trial court denied an attorney additional fees without an oral hearing, on the basis that the "litigation with all its ramifications" (*Wargo*, 191 Pa. Super. at 13) had been before that court for 10 years and the judge felt familiar enough with the parties and circumstances to render a decision without a prior hearing. The reviewing court held that the trial court's alleviation of a hearing was entirely justified considering the circumstances. *Id.* at 13.

And, as the court indicated in *Globe Indemnity Co. v. Sulpho-Saline Bath Co.*, 299 F. 219, cert. denied, 266 U.S. 606, 45 S.Ct. 92, 69 L.Ed. 464 (C.A. Neb. 1924), the trial court may act on its own knowledge concerning the

value of an attorney's services, and may award fees without taking evidence. See also *Stanolind Oil and Gas Co. v. Guertzgen*, 100 F.2d 299 (C.C.A. Mont. 1938).

The trial court provided claimant Kramer with an adequate opportunity to justify his claim for attorney fees. The burden of proof is on the attorney seeking to recover a fee, to show that the requested fee is appropriate and reasonable. *McKenzie Construction, Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985). The record shows, and it was determined by the trial Court, that Mr. Kramer has failed to carry this burden.

Attorney-respondents are not entitled to a hearing in order to constitute due process in an action for attorneys fees before a judge who is intimately familiar with the facts and circumstances of that attorney's services.

#### **IV. DID THE CIRCUIT COURT ERR IN OVERTURNING THE DISTRICT COURT'S FACT FINDING AND LEGAL CONCLUSIONS AS TO THE TERMINATION OF THE AGREEMENTS BETWEEN THE PLAINTIFFS BELOW AND THEIR FORMER COUNSEL, SMITH AND SWARTZ?**

In a release dated November 7, 1982, Smith and Swartz withdrew their representation from the Novingers, who alleged serious shortcomings in the attorneys' diligence in pursuing their case, and who then hired Bruce Desfor. The attorneys, Smith and Swartz, saw sufficient basis of malpractice to insist that the Novingers sign said release excusing the attorneys from liability in return for a waiver by the attorneys of any and all claims for compensation for "past services rendered" by attorneys Smith, Swartz and Cole. This document thus forever barred the Smith-Swartz claims. These attorneys gave up all rights to such money on November 7, 1982.

The district court judge weighed the contents of the release and found that attorneys Smith, Cole and Swartz had bargained away their right to compensation for past

services in return for a release from liability. The appellate court however came to the opposite conclusion despite the explicit language of the release:

Whereas, in consideration of the withdrawal of William T. Smith, David E. Cole and Lee C. Swartz as counsel in this case, and in consideration of past services rendered by the said William T. Smith, David E. Cole and Lee C. Swartz, Kevin and Darlene Novinger are agreeable to release the said William T. Smith, David E. Cole and Lee C. Swartz from any and all liability resulting from their legal representation.

In coming to their conclusion, the circuit court exceeded its appellate jurisdiction and superseded the fact finding role of the district court by reversing the lower court's decision without finding a clearly erroneous error on the part of the court below. *U.S. v. Singer Mfg. Co.*, 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963); *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746, *rehearing denied*, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948); *DeMarco v. U.S.*, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974); Fed.R.Civ.P. 52(a), 28 U.S.C.

The appellate court overrode the lower court, who had followed the circuitous path of the Novingers' case while it was still the responsibility of attorneys Smith, Cole and Swartz and who "[was] at a loss to understand" why these attorneys should seek reimbursement. Instead, the circuit court erroneously made their own factual determination that the clear language of the release at issue had no meaning in light of: (1) a subsequent document drafted by the next attorney (Rovner, not making a claim) who wrote into his agreement with the Novingers that they would

... pay him 40% of any settlement and/or jury verdict ... and in addition ... pay the expenses incurred by all the attorneys in this matter with a power to negotiate ...

and (2) correspondence by other counsel with the trial court, not the clients, about attorneys Smith, Cole and Swartz' inactive status in the case and with regard to fee-sharing among the attorneys. It is clear that in putting such erroneous emphasis on the Rovner document that the circuit court ignored the fact that the Rovner agreement came *after* the district court had ordered Kramer to present his claims at the end of the case. In other words, the circuit court did not realize that the cited language in Rovner's agreement only served as his acknowledgement that Kramer's claim was unresolved.

With regard to the subsequent attorney correspondence, it was noted by the district court that without disclosure to the Novingers, attorneys Smith and Swartz had arranged to receive 50% of any fee to be collected by Desfor. Again, the circuit court's action undercuts the rule that fact finding is the domain of the district court, and can only be set aside after a clearly erroneous standard has been applied. *Pullman-Standard v. Swint*, 456 U.S. 373, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *U.S. v. Singer Mfg. Co.*, 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963); *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746, *rehearing denied*, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948). *See also Plack v. Baumer*, 121 F.2d 676 (3d Cir. 1941); *In re Fine Paper*, 685 F.2d 810, 34 Fed.R.Serv. 2d (Callaghan) 513, 1982-2 Trade Cas. (CCH) P64, 843, *cert. denied*, 459 U.S. 1156, 103 S.Ct. 801, 74 L.Ed.2d 1004 (1982); *Adelman v. John McShain, Inc.*, 24 A.2d 703, 148 Pa.Super. 138 (1942), 5A C.J.S. Appeal and Error, Section 1583 (1958). The appellate court's function is complete when there appears some

basis for the lower court's holding, "... it being immaterial that the Court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kern*, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1946). In contravention of this established principle, the circuit court did not challenge the fee agreement/contract's construction or attempt to apply settled contract law to the facts, but merely gave more weight to facts already before, and appropriately weighed by, the trial court.

Furthermore, giving credence to subsequent writings between the claimant attorneys Smith-Swartz and a third party indicates a willingness on the circuit court's part to not only allow a third party to create an interest for the claimants but to do so to the detriment of the injured plaintiffs. The court places unwarranted significance on the extraneous writings of third parties; i.e., the correspondence of attorneys subsequent to, and unconsidered by, the Smith-Swartz-Novinger contract. In other words, the court would allow persons uninvolved in the relationship between these attorneys and the Novingers to dictate the contractual rights of those parties. The court's opinion is thus contradictory: it allows the writings of other attorneys to legitimize the Smith-Swartz claim while crediting the respondents' assertion that they should not be held to a contract which they, themselves, drafted. The circuit court has in effect said that the claimant attorneys did not know what they were signing (or drafting). To not enforce the attorneys' own contract is to give attorneys carte blanche to become fleetingly involved with a plaintiff's suit then decide that they cannot or do not want to be involved with the case, yet still retain the right to plaintiff's recovery at some remote point in time, no matter how explicitly they disassociate themselves from the case. It also allows the attorneys to play fast and loose with a client's contractual rights. This

represents second guessing by the appellate court and encourages unjust enrichment by any attorney who has been involved in contingency fee cases.

Finally, the fact that such a release from liability is ethically questionable should certainly weigh against the claimant attorneys in their pursuit to be enriched by it.

Attorneys Smith and Swartz bargained away their rights to share in the contingent fee arising from the Novinger's personal injury action when they prepared and executed a release from liability in exchange for withdrawing their claims to fees.

**V. DID THE TRIAL COURT PROPERLY EXCLUDE FROM PLAINTIFF KRAMER'S CLAIM FOR ATTORNEY FEES, ANY FEES RELATED TO SERVICES PROVIDED BEFORE DECEMBER 7, 1978 AND ANY FEES FOR MR. GEFFEN?**

The clearly erroneous standard must be applied when the appellate court reviews the factual determinations made by the finder of fact. *U.S. v. Singer Mfg. Co.*, 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963); *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746, *rehearing denied*, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948), Fed.R.Civ.P. 52(a), 28 U.S.C. The district court's responsibility to act as the primary fact finder. *DeMarco v. U.S.*, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974). See also *Pullman-Standard v. Swint*, 456 U.S. 373, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). Use of this standard is extended in Pennsylvania to include appellate review of a lower court's fact determination with regard to claims for attorneys fees. *Wargo v. Wargo*, 155 A.2d 423, 191 Pa Super. 10 (1959).

A review of attorney Kramer's claims for fees for himself and attorney Geffen must begin with the Kramer-Novinger contract. As outlined in Part VII. Statement of the Case, this contract was executed on December 7, 1978. There are two sections therein whose

language is relevant to this discussion. The first statement is Kramer's express waiver of his right to go against the Novingers for expenses incurred prior to December 7, 1978. Based on this language, the district court found Kramer's claim for expenses pre-dating this contract to be a "problem" and used this to hold that his claim was unreasonable.

As regards Kramer's claim for fees for Mr. Geffen, the Kramer-Novinger contract clearly demonstrates the Novingers' intention to have Kramer as their only attorney. Kramer's subsequent hiring of Geffen as a second attorney for the Novingers is therefore beyond the scope of authority given him by the Novingers. The district court in fact did find that the Novingers had "clearly state[d] that Kramer shall be the only attorney" in a letter to Kramer dated April 11, 1979. The court also found that this same term was in yet another agreement, this one drafted by Kramer on November 21, 1978. In the most favorable light, therefore, Kramer's action in hiring Geffen is unsupportable but for him to now pursue the Novingers for reimbursement for the expenses of doing so on his own authority smacks of fraud.

Nevertheless, despite the clarity and abundance of the evidence, the appellate court concluded that "as a matter of law" the trial court had erred in rejecting Kramer's claim for fees for attorney Geffen and for Kramer's own expenses prior to December 7, 1978. The circuit court reviewed the evidence not accredited by the district court in its order and determined that there was a "meeting of the minds" between the Novingers and Mr. Kramer with regard to expenses incurred by him prior to December 7, 1978. Not only is there a lack of evidence in support thereof, but the contract of December 7, 1978 expressly controverts it. With regard to Geffen, the circuit court held that

Obviously an attorney hired on a contingent basis . . . has implied authority to seek the assistance of

other attorneys. The provision in the April 11, 1979 letter about other attorneys cannot, on this record, as a matter of law, be construed to forbid such retention

...

The appellate court provided no basis for this part of the opinion and appears to disregard the rule that the attorney, before bringing in another attorney must obtain the client's consent after a full disclosure of the fee arrangement. ABA Code of Professional Responsibility, DR 2-107(A)(1). The mere phrase "as a matter of law" changes nothing. Actually, the Circuit Court may inappropriately be making law; i.e., the language of the opinion is tantamount to saying that all contracts are to be construed against the drafter except an attorney's contingency fee contract for personal service which allows an attorney impliedly to substitute the services of another attorney even though the client expressly refused to allow this result.

Alternatively, if there is sufficient evidence to support the circuit court's opinion, it is urged here that that court nevertheless overstepped its appellate jurisdiction by performing a *de novo* weighing of the evidence, and disregarded the clearly erroneous standard of review. *U.S. v. Singer Mfg. Co.*, 374 U.S. 174, 83 S.Ct. 1773, 10 L.Ed.2d 823 (1963); *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746, *rehearing denied*, 333 U.S. 869, 68 S.Ct. 788, 92 L.Ed. 1147 (1948).

The district court properly excluded attorney Kramer's claim for fees prior to December 7, 1978 on the fact record, which included the express language of the fee agreement executed by Kramer and the Novingers on that date. His claim for attorney fees for David Geffen was properly excluded as having exceeded the authority granted to Kramer by the Novingers.

### CONCLUSION

This Court should grant Petitioners' writ of certiorari in order to answer the question of the proper standard of review to be applied to the factual findings of a district court sitting without a jury in an action for attorneys fees.

Respectfully submitted,

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\* Catherine M. Ward, a law clerk, also contributed substantially to this brief.

## **APPENDIX**



UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NOS. 86-5216 and 86-5248

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NOVINGER, KEVIN and NOVINGER, DARLENE

v.

E. I. DuPONT de NEMOURS & CO., INC.  
MERCEDES-BENZ OF NORTH AMERICA INC.  
DAIMLER-BENZ ANTIEN GESELL SCHAFT,  
GLASURITE GmbH,  
BASF FARBER & FARSEHN AG and  
GENERAL MOTORS CORP.

v.

LESONAL-WERKE and DR. KURT HERBERTS CO.  
GmbH and ORIGINAL IMPORTS, INC. and  
RICHARD-YALE INDUSTRIES, INC.

Steven M. Kramer, Esq., Charles J. Geffen,  
Esq. and Lee C. Swartz, Esq.,

Appellants in No. 86-5216

William T. Smith, Esquire

Appellant in No. 86-5248

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ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE MIDDLE DISTRICT  
OF PENNSYLVANIA - SCRANTON

(D. C. Civil No. 79-1188)

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ARGUED November 21, 1986  
Before GIBBONS, *Chief Judge*, SEITZ,  
*Circuit Judge*, and BARRY, *District Judge*\*  
(Opinion filed January 15, 1987)

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\* Hon. Maryanne T. Barry, United States District Judge for the  
District of New Jersey, sitting by designation.

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**OPINION OF THE COURT**

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GIBBONS, *Circuit Judge*:

This appeal results from the efforts of the district court and successive attorneys to deal with two difficult and suspicious clients in a serious personal injury case. The appellants are attorneys who once represented those clients but whose services were terminated prior to the time when a substituted attorney executed a settlement for them. The attorneys appeal from orders denying their motions for payment of attorneys' fees and expenses out of the proceeds of that settlement. We reverse and remand for further proceedings.

I.

The plaintiffs Kevin and Darlene Novinger commenced the underlying diversity products liability action in 1979, alleging that Kevin Novinger was poisoned during the course of his employment as an auto mechanic from exposure to paint manufactured by the defendants. Novinger claimed that this exposure caused *inter alia*, blindness, permanent destruction of his teeth, and peripheral nerve damage, resulting in total disability. The Novingers asserted theories of strict liability and negligence.

The Novingers' diversity complaint was filed on their behalf by Steven M. Kramer, Esq. The Novingers had approached a Boston attorney, F. Lee Bailey, who referred them to Richard Sprague, Esq. Sprague, in turn referred the Novingers to the firm of Lewis & Kramer. On March 16, 1978 Kramer agreed in writing to prosecute workers' compensation and products liability claims on the basis of 40% of the gross recovery

in the products liability case plus costs and expenses, and 33 1/3% of the gross recovery in the workers' compensation case plus costs and expenses. In addition, Kramer agreed to advance all costs and expenses. As best can be determined from the information of record, the Novingers did not sign the March 16, 1978 agreement. On April 8, 1978 a more detailed writing was executed by Kramer, containing essentially the same terms, but clarifying what may have been some misunderstanding on the part of the Novingers.<sup>1</sup> This letter, too, was not signed by the Novingers. Kevin Novinger did, however, sign a July 10, 1978 letter in which Kramer undertook to prosecute cases against "Aetna, Patterson and Burnside" on the "same terms as applicable to the products liability case." This suggests that there was a meeting of the minds on those terms. On September 1, 1978 Kramer wrote to Darlene Novinger confirming the agreement that the Novingers retain Richard A. Sprague and the firm of Lewis & Kramer in the products liability case, on a 40% contingency basis, with the understanding that "you will be obligated to pay the firm the foregoing fee of 40% of the gross recovery plus costs and expenses, even if you decide to instruct us to withdraw from the case." From the information of record, it appears that the Novingers did not sign the September 1, 1978 letter. Finally, a letter agreement dated April 11, 1979 outlines a contingent fee agreement with Kramer of 33 1/3% of the gross recovery by verdict or settlement on the products liability case plus expenses. This letter is

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1. For example, the April 8, 1978 letter agreement states that in the event of an unfavorable verdict or no settlement, the firm would not seek reimbursement from the Novingers of costs and expenses, and that the gross recovery in the workers' compensation case does not include awards for S.S.I. or Social Security benefits.

signed both by Kramer and by the Novingers. It obligates Kramer to compensate Bailey for any fees to which he may be entitled and to hold the Novingers harmless from any claim by Sprague or by the firm of Lewis & Kramer, which by then was dissolved.

Meanwhile the workers' compensation case and the products liability case had been filed on the Novingers' behalf by Kramer. The products liability case was filed in the Eastern District of Pennsylvania on January 5, 1979. It was transferred to the Middle District of Pennsylvania on September 20, 1979.

The Novingers apparently were dissatisfied with Kramer's representation, and therefore, by a mailgram on July 21, 1980 purported to discharge him.<sup>2</sup> Kramer contended that prior to this time he and Charles J. Geffen, Esq. whom he retained to assist him in the preparation of the Novingers' case had expended substantial time and money. Consequently he asserted an attorneys' retaining lien on the Novingers' file. On February 11, 1981 the district court issued an order directing Kramer to show cause why he should not turn over the file to attorneys William T. Smith and David E. Cole, who on December 26, 1980 had entered an appearance on the Novingers' behalf. Apparently efforts were made to have Kramer surrender the file without reimbursement of expenses and without any recognition of his retaining lien. On April 9, 1981, however, the district court ordered:

[T]hat Steven M. Kramer shall submit his file on this matter to the court . . . [at] Harrisburg on or

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2. The reasons for the Novingers' dissatisfaction are disputed. Kramer contends the discharge occurred because he advised them that their expert, Dr. Leon Prockup wanted Kevin Novinger to undergo a psychiatric examination. The Novingers contend Kramer was less diligent in pursuing their cases than he should have been.

before April 20, 1981. At the conclusion of the case the court will determine what expenses and attorneys' fees should be paid to Steven M. Kramer. Due to the unique fee and expense agreement existing between the Novingers and Mr. Kramer, the court will not order payment of expenses at this time.

Kramer was not entirely satisfied with the protection afforded by this order and filed a notice of appeal. His motion for a stay was denied, and the district court ordered him to show cause why he should not be barred from further practice for failure to obey the April 9, 1981 order. On May 19, 1981 Kramer surrendered the file and subsequently withdrew his first appeal.

Smith was retained by the Novingers pursuant to a written contingent fee agreement dated December 17, 1980, covering the district court products liability case, a parallel common pleas court products liability case, the workers' compensation case, a common pleas court medical malpractice case, and a suit against the Aetna Insurance Company and others for unpaid insurance benefits. The agreement called for payment of 25% of all amounts received by way of settlement, 33 1/3% of all amounts received after trial and verdict, plus costs and disbursements. In addition, the agreement contained a recital to the effect that the Novingers were prepared to show that Kramer had breached the terms of their April 11, 1979 agreement, and provided:

15. Attorney agrees that in the event of any settlement in any of the civil actions set forth in this Agreement, that the settlement check or checks will be made payable to Attorney and Clients. Under no circumstances whatsoever are the names of any previous attorneys, law firms, individuals or prior counsel, such as, but not

limited to those mentioned herein, to appear on my settlement check whatsoever.

Attorney Contingent Agreement at 6. Kramer was not a party to the December 17, 1980 Smith-Novinger agreement, and nothing in the record suggests that he or the district court were aware of its terms at the time the April 9, 1981 order was entered.

Smith and Cole entered an appearance for the Novingers, and in February, 1981 Smith retained Lee C. Swartz, Esq. to be lead counsel in the case. The Novingers refused to sign a retainer agreement tendered by Swartz, although he apparently made it clear that his retention would involve no new obligation beyond that set forth in the Smith-Novinger December 17, 1980 agreement.

The relationship between the Novingers and the Smith-Cole-Swartz team of attorneys apparently was no less turbulent than that between the Novingers and the Kramer-Geffen team. The Novingers terminated the services of the Smith-Cole-Swartz team, and thereafter retained Bruce D. Desfor, Esq. pursuant to a written agreement. On November 7, 1982 in connection with Desfor's retention the Novingers executed a release as follows:

WHEREAS, Kevin and Darlene Novinger have retained William T. Smith and David E. Cole to prosecute various actions on their behalf resulting from injuries sustained by Kevin Novinger due to exposure to toxic paints, and also have retained Lee C. Swartz, along with William T. Smith and David E. Cole, to prosecute a tort action against various defendants in the United States District Court for the Middle District of Pennsylvania; and

WHEREAS, the said Kevin and Darlene Novinger are desirous of obtaining new counsel to prosecute

all legal actions on their behalf, including but not limited to those actions referred to in a contingent fee agreement dated December 17, 1980; and

WHEREAS, in consideration of the withdrawal of William T. Smith, David E. Cole and Lee C. Swartz as counsel in this case, and in consideration of past services rendered by the said William T. Smith, David E. Cole and Lee C. Swartz, Kevin and Darlene Novinger are agreeable to release the said William T. Smith, David E. Cole and Lee C. Swartz from any and all liability resulting from their legal representation.

KNOW ALL MEN BY THESE PRESENTS, that we, Kevin and Darlene Novinger, husband and wife, 1388 Lowther Road, Camp Hill, Pennsylvania, each being of lawful age and sound mind, do hereby jointly and severally acknowledge that for each of us and our heirs, successors, executors, administrators and assigns that we, Kevin and Darlene Novinger, intending to be legally bound, do hereby release and forever discharge the said William T. Smith and David E. Cole and the law firm of Smith and Smith, P.C.; and Lee C. Swartz and the law firm of Hepford, Swartz, Menaker & Wilt; and their successors, assigns, administrators, agents, servants, employees and all other persons employed or retained by their firms, from any and every claim, in law or at equity, legal or otherwise arising from, by reason of or pertaining in any way to Kevin and Darlene Novinger's retention of the said William T. Smith, David E. Cole and Lee C. Swartz.

We further understand that this release is not to be construed as an admission of any type of liability on the part of the party or parties hereby released.

Darlene Novinger further states that she has carefully read the foregoing release and Kevin Novinger states that the foregoing release has been read to him, and that both know the contents thereof and that do sign it as their own free act.

November 7, 1982 Release. Although Desfor was to prosecute the case, by letter docketed on November 30, 1982, Cole advised the district court that the Novingers had not asked Cole or Swartz to withdraw their appearance, but that their role would be inactive. The letter disclosed, further, that arrangements had been made between Desfor, Smith, Swartz and Cole respecting distribution of any fees from settlement or verdict. The new arrangement did not prove to be satisfactory to the Novingers. On December 7, 1982 Smith and Cole moved to withdraw their appearance and that motion was granted. Thereafter Swartz and Desfor also asked to be relieved.

The district court ordered the Novingers to obtain new counsel by November 6, 1984 or suffer a dismissal. On November 2, 1984 they signed a retainer agreement with Angino & Rovner, P.C. which provides in relevant part:

In consideration [of Angino & Rovner, P.C. undertaking representation], we hereby agree to pay ANGINO & ROVNER, P.C. forty (40%) per cent of any settlement and/or jury verdict so obtained and in addition to pay the expenses incurred by all the attorneys in this matter with a power in ANGINO & ROVNER, P.C. to attempt to negotiate on our behalf for a most favorable settlement as to previous attorney's fees and expenses.

Power of Attorney and Fee Agreement dated November 2, 1984. Thus in November, 1984 the Novingers acknowledged in writing that claims for attorneys' fees and expenses were outstanding and might be asserted

interest in those arrangements because they bear directly upon the ability of the court to dispose of cases before it in a fair manner. This case is perfectly illustrative. Differences arose between the Novingers and the successive counsel. If the federal forum were powerless either to order counsel to turn over a file or to authorize voluntary withdrawal in the face of such differences, the court's ability to dispose of the case would be severely limited. Thus there cannot be any question that the court has authority to enter orders such as those directing Kramer to surrender the file upon which he claimed a state law retaining lien, and permitting Smith and Swartz to withdraw. This power necessarily includes the power to resolve disputes with respect to the payment of attorneys' fees and expenses. Moreover, in the context of contingent fee litigation the nature of such disputes is such that they cannot be resolved at the time the court acts to permit substitution of counsel. At that point in the lawsuit the reasonable value of the attorney's services cannot be determined because it must be measured, at least in part, against the results obtained. Thus the rule of necessity with respect to attorney-client disputes growing out of the substitution of attorneys in the course of litigation must be broad enough to permit the resolution of those disputes after the underlying case has been resolved by judgment or settlement.

No case in this court addressing the precise jurisdictional question raised by the Novingers has been called to our attention.<sup>3</sup> In *Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1108 (3d Cir. 1979), however, we recognized that federal courts have the power to monitor contingent fee arrangements. See also

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3. In *McKenzie Constr., Inc. v. Maynard*, 758 F.2d 97, 99 (3d Cir. 1985) the District Court of the Virgin Islands, a court of general jurisdiction, had unquestioned subject matter jurisdiction.

*Schlesinger v. Tettelbaum*, 475 F.2d 137, 141 (3d Cir.), cert. denied, 414 U.S. 1111 (1973)(federal court has supervisory jurisdiction to redetermine contingent fees in admiralty cases). These holdings are consistent with those in other courts which have recognized that there is ancillary jurisdiction to resolve attorney-client fee disputes in cases pending before federal courts. See, e.g., *Moore v. Telfon Communications Corp.*, 589 F.2d 959, 967 (9th Cir. 1978); *Iowa v. Union Asphalt & Roadolls, Inc.*, 409 F.2d 1239, 1243-44 (8th Cir. 1969); *National Equip. Rental Ltd. v. Mercury Typesetting Co.*, 323 F.2d 784, 786 (2d Cir. 1963); *American Fed'n of Tobacco-Growers, Inc. v. Allen*, 186 F.2d 590, 592 (4th Cir. 1951)(per curiam); *Doggett v. Deauville Corp.*, 148 F.2d 881, 883 (5th Cir. 1945). Thus we hold that the district court properly rejected the Novingers' jurisdictional challenge.<sup>4</sup>

#### IV.

Besides their jurisdictional objection the Novingers objected in a memorandum of fact and law on substantive grounds to the payment of any attorneys' fees. No affidavits were filed on their behalf. In contrast the moving attorneys supported their motions by affidavits and by detailed records of their services and expenses. The district court, however, denied those motions without a hearing. The court's reasoning differs with respect to the Kramer-Geffen and the Swartz-Smith applications. Before addressing that reasoning it is appropriate to outline briefly the Pennsylvania law governing attorney-client contracts for contingent fee representation.

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4. We leave for another day the question whether ancillary jurisdiction extends to the resolution of a post settlement fee dispute between two attorneys, only one of whom was attorney of record. See *Taylor v. Kelsey*, 666 F.2d 53 (4th Cir. 1981)(per curiam).

In Pennsylvania, the relationship between an attorney and a client is contractual. Nevertheless, a client may terminate the relationship at any time. *Richette v. Solomon*, 410 Pa. 6, 187 A.2d 910 (1963); *Sundheim v. Beaver County Bldg. & Loan Ass'n.*, 140 Pa. Super. 529, 14 A.2d 349 (1940). The attorney, on the other hand, may withdraw from representation only for reasonable cause and upon reasonable notice. *Spector v. Greenstein*, 85 Pa. Super. 177 (1925). As in other states, Pennsylvania recognizes that contingent fee agreements are lawful and binding on the parties thereto. See, e.g. *Richette v. Solomon*, *supra*. Although Pennsylvania Civil Procedure Rule 202 requires that contingent fee agreements be in writing, the absence of such a writing does not make oral contingent fee arrangements unenforceable. *Silverstein v. Hirst*, 376 Pa. 536, 103 A.2d 734 (1954). Similarly, like other retention agreements, contingent fee agreements are terminable by the client. When a client terminates the relationship the original attorney can recover reasonable compensation up to the time he was discharged. *Powers v. Rich*, 184 Pa. 325, 39 A. 62 (1898). Moreover, when a client through his own action makes it impossible for the attorney to perform the contract, a *quantum meruit* recovery is permitted. *Thole v. Martino*, 56 Pa. Super. 371 (1914). Furthermore, Pennsylvania common law recognizes both a general retaining lien and legal and equitable charging liens. The common law general retaining lien permits the attorney to retain money, papers or other property in his possession to secure payment of costs and fees not only in the particular case, but arising out of other professional business as well. *Greek Catholic Union of Russian Brotherhoods v. Russin*, 340 Pa. 295, 17 A.2d 402 (1941); Comment, *Attorney and Client-Attorney's Lien*, 45 Dick. L. Rev. 330 (1941). The equitable charging lien gives an attorney the right

to be paid out of a fund in court which resulted from his skill and labor, thereby extending only to services rendered in the particular case. *Miller v. Union Barge Line Corp.*, 299 F.Supp. 718 (W.D. Pa. 1969); Comment, *The Attorney's Lien in Pennsylvania*, 54 Dick. L. Rev. 62, 68 (1949). The legal charging lien applies to a fund in the attorney's possession as a result of his efforts in a particular case. *Smyth v. Fidelity & Deposit Co.*, 326 Pa. 391, 192 A. 640 (1937).

With these general principles in mind several points are clear. First, the Novingers could not by unilateral action eliminate the claims of Kramer and Geffen for compensation for services rendered prior to their discharge. Nor was Kramer's retention of the file improper, at least not until such time as the district court took some step which recognized and provided a substitute for his retention lien. Second, Swartz and Smith were entitled to make appropriate arrangements with the attorneys who succeeded them with respect to compensation for the services they had already rendered.

In dealing with the Kramer-Geffen claim the district court noted that the Novingers' memorandum charged Kramer with professional misconduct because he allegedly did not diligently pursue their claims and because he hired Geffen to assist him. The court concluded:

The charges of failure to appear for a hearing and the lien placed against plaintiffs' home are serious. This court will not extend its jurisdiction to entertain a malpractice action to determine the existence or extent of Kramer's alleged misconduct. Further, he had no authority to hire Geffen; thus, within the terms of the contract, he cannot bill the Novingers for that time. Kramer has failed, despite court order, to delineate which of his fees relate specifically to this litigation.

*Novinger v. E.I. DuPont de Nemours & Co.*, Civ. No. 79-1188, slip op. at 6-7 (M.D.Pa. Mar. 26, 1986). With due regard to the district court's knowledge of the district court record, this reasoning is completely inadequate to support the dismissal without a hearing of the Kramer-Geffen claim for fees and expenses. The court order to which the court refers was entered prior to the entry of the April 9, 1981 order, which terminated Kramer's retention lien on the express condition that his attorneys' fees and costs be determined at the conclusion of the case. The court *did* exercise jurisdiction to terminate the retention lien, and it is entirely specious to reason that consideration of a potential defense to the fee claim would "extend its jurisdiction." Moreover, the form of the order appealed from denies the fee motion on the merits, not for lack of jurisdiction. Thus it would, if not reversed, bind Kramer and Geffen in a state court lawsuit. The effect of the order, therefore, was to decide the dispute against Kramer and Geffen on the basis of the unverified contents of the Novingers' memorandum, without a hearing, even though the charges of professional misconduct are disputed. Even the contention that Kramer lacked authority to hire Geffen is disputed. Obviously an attorney hired on a contingent basis to prosecute a personal injury case has implied authority to seek the assistance of other attorneys. The provision in the April 11, 1979 letter about other attorneys cannot, on this record, as a matter of law, be construed to forbid such retention so long as the hired attorney's services were also subject to the contingent fee terms of that agreement.

In dismissing the Swartz-Smith motion for fees, the district court, relying on the release quoted in Part I above, held that as a matter of law these attorneys had waived their retention liens and thus any claim for

recovery of the reasonable value of their services. With respect to a charging lien the court reasoned:

Any basis for the assertion of a charging lien is seriously flawed. While this court will not here review in detail the activities of each attorney connected with this case, all of the attorneys now seeking fees had withdrawn by December 7, 1982 when Mr. Desfor became counsel. This court cannot say that services rendered more than three years before trial and settlement in this case substantially contributed to the fund out of which each seeks to be paid. Further there are equitable considerations which operate against the receipt of fees by the attorneys in question.

*Id.* at 8-9. The "equitable considerations" to which the court refers, however, are nowhere identified. The present record does not permit a conclusion that, as a matter of law, the Swartz-Smith team made no contribution to the settlement fund. Indeed, Swartz and Smith contend that at trial, prior to settlement, the Novingers' trial attorney utilized the services of an expert witness whom they had obtained and instructed. Thus we can only affirm with respect to the Swartz-Smith motion if, as a matter of law, the release on which the Novingers rely was a contractual waiver of all claims both for services and for reimbursement of expenses.

The Novingers note that they released Smith and Swartz from any claims arising out of their representation "in consideration of the withdrawal of William T. Smith, David E. Cole and Lee C. Swartz as counsel in this case and in consideration of past services rendered by the said William T. Smith, David E. Cole and Lee C. Swartz." This release, they claim, was intended to be complete compensation for all past

services and for any claim for reimbursement of expenses. The fee applicants, on the other hand, claim that they did not sign the release, and that it was intended to do no more than protect them against claims of professional misconduct when the Novingers' insisted upon Desfor coming into the case. Their version of the understanding of the parties with respect to the effect of the release is supported by the letter to the court docketed on November 30, 1982, stating that they would remain in the case in an inactive role. It is supported as well by the text of the November 6, 1984 retainer agreement which the Novingers signed with Angino & Rovner, P.C.

Swartz and Smith certainly were free to bargain away any right they had to be paid the reasonable value of their services and to be reimbursed for their expenses. Whether they did so is a question of the intention of the parties -- a question of fact which on this record cannot be resolved. Thus we cannot affirm the denial of their motion on the basis of a contractual waiver. Disputed fact issues as to the intention of the parties must be resolved in the district court.

V.

The order appealed from will be reversed and the case remanded for further proceedings consistent with this opinion. We also hold that, in order for the applicant-attorneys to present their case knowledgeably, the total settlement amount must be disclosed to them.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit*

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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Civil Action No. 79-1188

---

KEVIN NOVINGER and DARLENE NOVINGER,  
*Plaintiffs*

*v.*

E.I. DuPONT de NEMOURS AND CO., INC., et al.,  
*Defendants*

*v.*

LESONAL WERKE, et al.,  
*Third-Party Defendants*

---

**MEMORANDUM**

This action was settled and discontinued as to all parties by order of this court dated February 12, 1986. Now before the court are several motions by attorneys who previously represented plaintiffs during the course of this litigation but who were discharged by plaintiffs prior to trial. These motions were filed by Attorneys Steven Kramer and Charles Geffen, Lee Swartz and William Smith. These motions address the issue of attorneys' fees. On March 7, 1986, defendants BASF, Herberts, DuPont, Mercedes-Benz and Lesonal filed a Motion for Leave to Deposit Funds into the Court per Fed. R. Civ. Pro. 67. On March 11, 1986, plaintiffs filed a motion to compel the payment of settlement monies and/or to satisfy a judgment. On Friday, March 21, 1986, plaintiffs filed their brief in response to the motions of Kramer, Swartz and Smith.

The history of this case is long and somewhat tortured. Plaintiffs commenced this product liability suit in

1979 alleging that Kevin Novinger suffered toxic poisoning as a result of exposure to chemicals in paints manufactured, sued, supplied or recommended by the defendants. They asserted theories of strict liability and negligence. Related actions including a Workman's Compensation claim were filed in other jurisdictions. During the course of this litigation, plaintiffs were represented by six attorneys or teams of attorneys. Present counsel, who brought this case to trial in February 1986 and ultimately effected the settlement of this case, entered their appearance on July 22, 1985. Once that settlement was in place, several of plaintiffs' prior counsel sought to assert attorneys' liens or charging liens on the proceeds. Attorney Kramer threatened defendants with legal action if any funds were dispersed. Defendants, in response to those threats, have withheld the settlement proceeds.<sup>1</sup>

The court ordered prior counsel who were seeking judicial resolution of their fees to brief the question of this court's jurisdiction. After reviewing the case law presented, the court is still not entirely satisfied that it has jurisdiction to entertain such requests. The Third Circuit opinion which most strongly supports the proposition is *Dunn v. H. K. Porter Co., Inc.*, 602 F.2d 1105 (3d Cir. 1979). The issue in *Dunn* was "the authority of the district court to set aside private contingent fee agreements entered into between a member of the bar and various members of a class, properly certified pursuant to Fed.R.Civ.P. 23(b)(3)". 602 F.2d at 1106. The court found that

[b]ecause contingency fee agreements are of special concern to the courts and are not to be enforced on the same basis as are ordinary commercial contracts [citation omitted] courts have the power to

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1. Defendant General Motors had already paid its portion of the settlement to the plaintiffs at the time of Mr. Kramer's initial correspondence.

monitor such contracts either through rulemaking or on an *ad hoc* basis.

602 F.2d at 1108. Citing *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3d Cir.), *cert. denied*, 414 U.S. 1111 (1973), the court stated that "in its supervisory power over the members of its bar, a court has jurisdiction of certain activities of [its] members, including the charges of contingent fees." 602 F.2d at 1109.

Despite that sweeping language, the factual circumstances giving rise to *Dunn* as well as the facts of other cases cited by the Court of Appeals and by counsel here, differ significantly from the circumstances at bar. *Dunn* was a class action suit; special supervisory obligations are placed on the court by that type of litigation. See, e.g. F.R.Civ.P. 23(e). Other cases are also distinguishable. *Lindy Bros. Buildings, Inc. v. American Radiator & Standard Sanitary Corp.*, [*Lindy I*], 487 F.2d 161 (3d Cir. 1973), and *Lindy II*, 540 F.2d 102 (3d Cir. 1976) was a class action suit in which the payment of fees was to be made from a common fund. Courts also determine attorneys' fees where a statute provides for the recovery of such fees. See *Fitzgerald v. Freeman*, 409 F.2d 437 (7th Cir.), *cert. denied* 396 U.S. 875 (1969); *Farmington Dowell Products Co. v. Forster Manufacturing Co.*, 421 F.2d 61, 87 (1st Cir. 1969) (both were private antitrust actions seeking treble damages with fees authorized by 15 U.S.C. Sec. 15); *Krauss v. Rhodes*, 640 F.2d 214 (6th Cir. 1981) (a civil rights action where fees are permitted pursuant to 42 U.S.C. Sec. 1988). As the *Dunn* court points out, in other instances courts exercise this power to protect those who are unable to bargain equally with their attorneys, such as children, *Cappel v. Adams*, 434 F.2d 1278 (5th Cir. 1970), or seamen, *Schlesinger*, *supra*, 475 F.2d at 140. Another case cited, *In re Michaelson*, 511 F.2d 882, 888 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975) arose in the context of a contempt

proceeding when an attorney refused to answer questions propounded by the grand jury regarding fees charged to a client. Finally, *McKenzie Construction, Inc. v. Maynard*, 758 F.2d 97 (3d Cir. 1985) was an action to set aside an attorney's fee as excessive, but arose in the Virgin Islands where the district court is a court of general jurisdiction.

The instant case presents no such circumstances. Plaintiffs here sought to bring an action for personal injuries and retained an attorney on a contingent fee basis. The only apparent reason that the issue is now before the court is that plaintiffs fired several attorneys during the course of the litigation; those attorneys now seek to recoup fees and costs out of the settlement proceeds.

The court is not entirely comfortable asserting jurisdiction over these claims because in doing so, it is acting as a collection agency for prior counsel.

Counsel seem to rely on the court's order of April 9, 1981 which sought to preserve Attorney Kramer's right to seek fees, if warranted, at the end of the litigation. It must be remembered that at the time of that order, plaintiffs had discharged Attorney Kramer and retained new counsel. Action in this case had been delayed for almost one year in the process. New counsel's efforts to proceed were hampered by a lack of information at least in part caused by Kramer's refusal to release plaintiffs' file. The orders of February 11, March 2, March 24, April 9, May 5, and May 18, 1981 must be read in context. Finally, despite any language in those orders to the contrary, this court cannot create jurisdiction where none exists.

Because of the language in *Dunn*, the court feels compelled to resolve the claims now before it. This decision is bolstered by consideration of the interest in judicial economy; the court is familiar with this case and with the actions of all of those concerned. An immediate resolution is in the interests of all parties.

In matters such as this, the burden of proof is on the attorney seeking to recover a fee to show that the fee is

reasonable. *McKenzie, supra*, 758 F.2d at 100. The appropriate measure of reasonableness is whether a lawyer's conduct, as against that of the client, "has resulted in such an enrichment at the expense of the client that it offends a court's sense of fundamental fairness and equity". 758 F.2d at 101. Finally, the factors to be considered in determining the reasonableness of a fee include the results obtained, the quality of the work, and whether the attorney's efforts substantially contributed to the result. The relevant factors are not limited to those which existed at the time the agreement was executed. *Id.* (other citations omitted). Events may occur after the fee arrangement making what was in the first instance a fair contract unfair in the enforcement. *Id.*

### **Attorney Kramer**

It appears from the recitation of facts in plaintiff's brief that plaintiffs originally retained the law firm of Lewis & Kramer. There are at least four written contracts reflecting this arrangement (Plaintiff's Exhibits A, B, C, D). The law partnership was subsequently dissolved and plaintiffs retained Kramer individually (Plaintiffs' Brief at p. 11 and fn. 14).

Plaintiffs retained Mr. Kramer on December 7, 1978 and executed a contingent fee agreement on April 11, 1979 (Plaintiff's Exhibit G; Kramer Exhibit A). Kramer maintains that at about that time, he requested that Charles Geffen assist him and that this was done with the full knowledge and consent of the Novingers.<sup>2</sup> (Kramer Brief at p. 2) The April 11, 1979 agreement, apparently drafted by the Novingers, clearly states that Kramer shall be the only attorney. This aspect of the agreement was also present in an earlier document drafted by Kramer on November 21, 1978 (Plaintiff's Exhibit G).

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2. Mr. Geffen's claim for fees is also before this court in conjunction with that of Attorney Kramer.

Plaintiffs subsequently discharged Mr. Kramer asserting that the discharge was for cause and for professional misconduct. The Novinger's complaints against Kramer are detailed at pp. 31-33 of plaintiff's brief and are not new to the court. They include failure to communicate with clients for several months, failure to appear for a Workman's Compensation hearing on April 28, 1979 and failure to answer discovery in a related state court action causing that court to place a lien on the Novingers' home to cover associated costs. Plaintiffs contend that they made repeated efforts to fire Kramer, finally sending him a mailgram on July 21, 1980. It was not until May 19, 1981, under threat of contempt of court, that Attorney Kramer finally withdrew and turned plaintiffs' file over to newly retained counsel.

The court has several problems with respect to Kramer's request for fees and costs. First it is difficult if not impossible to determine which of Kramer's efforts are attributable to this litigation and which relate to the still-pending state court suit. See Order of March 2, 1981. Secondly, Kramer had no demonstrable authority from the Novingers to retain Geffen and yet seeks to charge them for work performed by Geffen (See Kramer's Exhibit E and items detailed in Plaintiff's Brief at 47-56). Other charges for which Kramer seeks reimbursement pre-date the December 7, 1978 retainer.

The charges of failure to appear for a hearing and the lien placed against plaintiffs' home are serious. This court will not extend its jurisdiction to entertain a malpractice action to determine the existence or extent of Kramer's alleged misconduct. Further, he had no authority to hire Geffen; thus, within the terms of the contract, he cannot bill the Novingers for that time. Kramer failed, despite court order, to delineate which of his fees relate specifically to this litigation. Related state court actions are still pending.

### Attorneys Smith and Swartz

William Smith, who had a contract with plaintiffs (Plaintiff's Exhibit K) was hired in December of 1980. Smith apparently utilized the services of David E. Cole, who was not a party to the contract. On February 10, 1981, Smith brought in Lee Swartz to "take over the management strategy and become, in effect, lead counsel . . ." *Swartz Motion*, pp. 2-3. Plaintiffs refused to sign the retainer agreement tendered by Swartz (Plaintiff's exhibit N). Swartz acknowledges that he has no signed agreement. *Swartz Brief*, p. 3. Further, Swartz expressly indicates that there was no new obligation to him from the clients but only the original Smith-Novinger agreement. *Swartz Motion*, p. 3. Therefore, there would be no duplication of fees. Plaintiffs subsequently fired the Smith/Swartz team alleging, in part that the attorneys failed to work on the file, and retained the services of Bruce Desfor. Plaintiffs were asked to execute and fact executed a release of Smith and Swartz. That agreement states in part

Whereas, in consideration of the withdrawal of William T. Smith, David E. Cole and Lee C. Swartz as counsel in this case, *and in consideration of past services rendered* by the said William T. Smith, David E. Cole and Lee C. Swartz, Kevin and Darlene Novinger are agreeable to release the said William T. Smith, David E. Cole and Lee C. Swartz from any and all liability resulting from their legal representation. (Emphasis added)

Swartz Exhibit B. In the face of the explicit language of the release, the court is at a loss to understand why Attorneys Smith and Swartz now seek a determination of fees. Plaintiffs now allege that despite this agreement and without disclosure to the Novingers, Smith and

Swartz arranged to receive 50% of whatever fee Mr. Desfor would collect. However, this has not been documented to the court.

An agreement was signed by the Novingers retaining Mr. Desfor. His claim for fees is not before the court.

Mr. Kramer, and Mr. Geffen with him, asserts a claim based on *quantum meruit*, *Lampl v. Latkanich*, 210 Pa. Super. 83, 231 A. 2d 890 (1967) and on the existence of a retaining lien. Mr. Swartz asserts the existence of a charging lien. See *United States v. Fidelity Philadelphia Trust Co.*, 459 F.2d 771 (3d Cir. 1972) and cases cited therein.

There are five conditions precedent to the creation of a charging lien.

To establish a charging lien "it must appear (1) that there is a fund in court or otherwise applicable for distribution on equitable principles, (2) that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his compensation, (4) that the lien claimed is limited to costs, fees or other disbursements incurred in the litigation by which the fund was raised and (5) that there are equitable considerations which necessitate the recognition and application of the charging lien". *Recht v. Urban Redevelopment Authority of Clairton*, 402 Pa. 599, 608, 168 A.2d 134, 138-139 (1961).

### **Fidelity Philadelphia Trust Co., supra.**

A retaining lien has been described as the right of an attorney to refuse to surrender documents and papers in his possession belonging to his client, until paid for his service. The retaining lien applies only to client's property in the actual possession of the attorney which was acquired during the course of his professional employment. *Fidelity Philadelphia Trust Co., supra.*

Any basis for the assertion of a charging lien is seriously flawed. While this court will not here review in detail the activities of each attorney connected with this case, all of the attorneys now seeking fees had withdrawn by December 7, 1982 when Mr. Desfor became counsel of record. This court cannot say that services rendered more than three years before trial and settlement in this case substantially contributed to the fund out of which each seeks to be paid. Further there are equitable considerations which operate against the receipt of fees by the attorneys in question.

As already indicated, plaintiffs have made serious charges related to the performance of Mr. Kramer. This court cannot permit the recovery of fees by an attorney with whom plaintiffs were so seriously dissatisfied. Attorneys Smith and Swartz settled their claims with plaintiffs in exchange for a promise of immunity from liability. While the court offers no comment on the ethics or enforceability of such a release, it will not now permit those same attorneys to ignore the release and secure payment. The requests of Kramer, Geffen, Smith and Swartz are not reasonable in light of the circumstances of the case and the motions will be denied.

An appropriate order will issue.

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Sylvia H. Rambo  
United States District Judge

Dated: March 26, 1986

UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

---

Civil Action No. 79-1188

---

KEVIN NOVINGER and DARLENE NOVINGER,  
*Plaintiffs*

*v.*

E.I. DUPONT de NEMOURS AND CO., INC., et al.,  
*Defendants*

*v.*

LESONAL WERKE, et al.,  
*Third-Party Defendants*

---

**ORDER**

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1. The motion of defendants to pay monies into court is denied;
1. The motions of Kramer/Geffen, Smith and Swartz are denied;
3. The motion of plaintiffs to enforce the settlement is granted;
4. Defendants shall immediately release all settlement proceeds to plaintiffs and their attorneys.

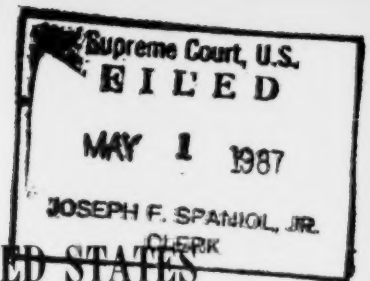
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Sylvia H. Rambo  
United States District Judge

Dated: March 26, 1986



No. 86-1590



IN THE  
**SUPREME COURT OF THE UNITED STATES  
OF AMERICA**

October Term, 1986

NOVINGER, KEVIN and NOVINGER, DARLENE,  
*Petitioners*

v.

STEVEN M. KRAMER, ESQ.  
CHARLES J. GEFFEN, ESQ.  
LEE C. SWARTZ, ESQ.

*Respondents in No. 86-5216*

WILLIAM T. SMITH, ESQ.  
*Respondent in No. 86-5248*

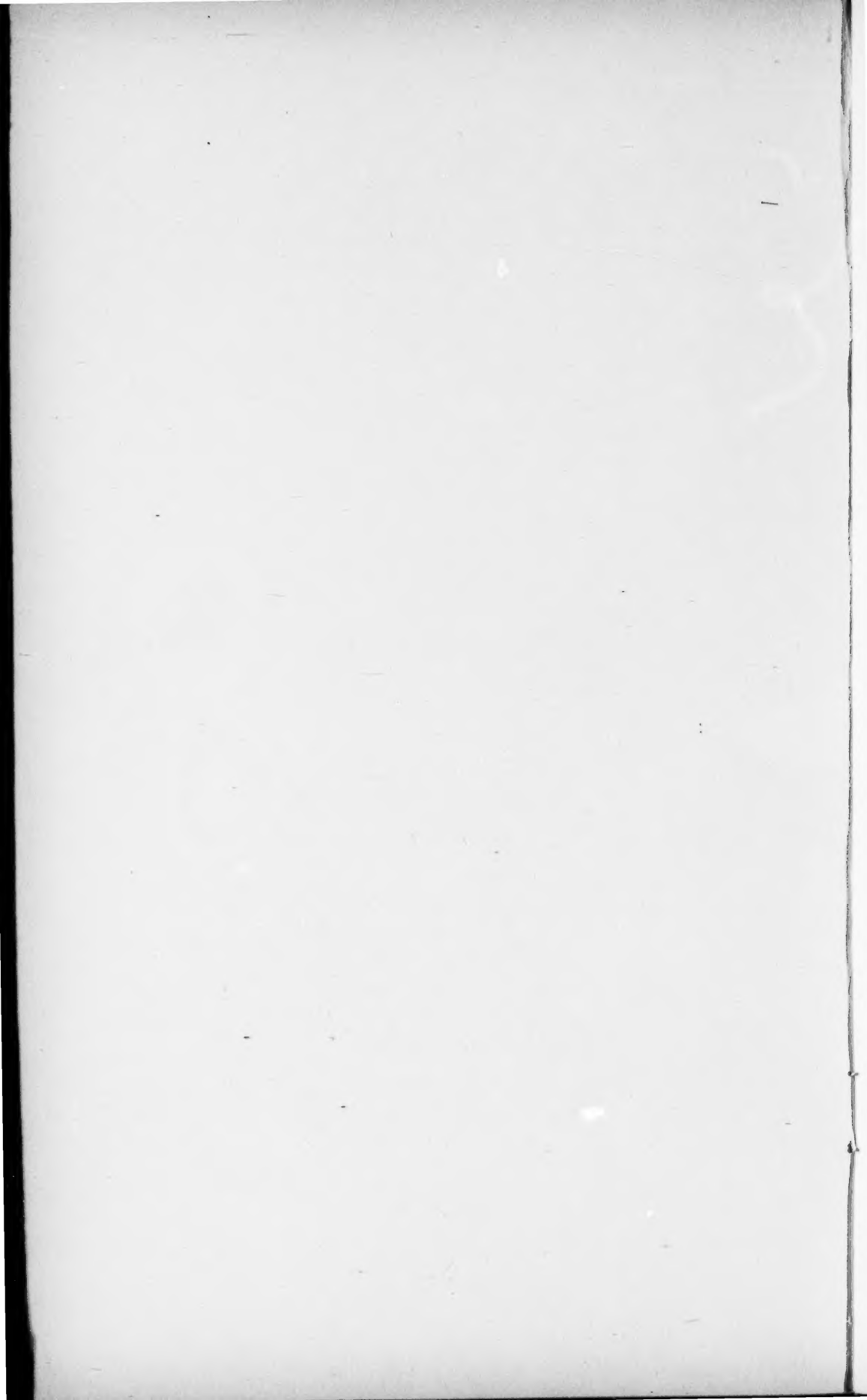
On Writ of Certiorari to the United States Court of Appeals  
for the Third Circuit  
(Appeal Nos. 86-5216 and 86-5248)

**BRIEF IN OPPOSITION TO PETITION  
FOR CERTIORARI**

Lee C. Swartz, Esquire  
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*Respondent, pro se and  
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23417



## LIST OF ALL PARTIES

---

KEVIN NOVINGER and DARLENE NOVINGER,  
*Petitioners*

v.

E. I. duPONT de NEMOURS & CO., INC.  
MERCEDES-BENZ OF NORTH AMERICA, INC.  
DAIMLER-BENZ ANTIEN GESELLSCHAFT GLASURITE  
GmbH, BASF FARBER & FASERN AG and  
GENERAL MOTORS CORP.

v.

LESONAL WERKE and DR. KURT HERBERTS CO. GmbH,  
ORIGINAL IMPORTS, INC. and  
RICHARD-YALE INDUSTRIES, INC.,  
*Defendants Below*

STEVEN M. KRAMER, ESQ., CHARLES J. GEFFEN, ESQ.  
LEE C. SWARTZ, ESQ. and WILLIAM T. SMITH, ESQ.  
*Respondents*

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No. 86-1590

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IN THE  
**SUPREME COURT OF THE UNITED STATES  
OF AMERICA**

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October Term, 1986

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NOVINGER, KEVIN and NOVINGER, DARLENE,  
*Petitioners*

*v.*

STEVEN M. KRAMER, ESQ.

CHARLES J. GEFFEN, ESQ.

LEE C. SWARTZ, ESQ.

*Respondents in No. 86-5216*

WILLIAM T. SMITH, ESQ.

*Respondent in No. 86-5248*

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On Writ of Certiorari to the United States Court of Appeals  
for the Third Circuit  
(Appeal Nos. 86-5216 and 86-5248)

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**BRIEF IN OPPOSITION TO PETITION  
FOR CERTIORARI**

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**STATUTES INVOLVED**

28 U.S.C. Sec. 1291

Respondent objects to and finds irrelevant the statutes set forth by Petitioners in their petition:

Statutes 39 U.S.C.A. Sec. 1001 and 39 U.S.C.A. Sec. 1001(b) are not elaborated on nor explained in Petitioners' petition and deal with subjects not at issue in this petition.

### STATEMENT OF THE CASE

The Petitioners and Plaintiffs below initiated a diversity products liability action which, although never tried, culminated in the expenditure of at least 10 sets of attorneys over a period of almost eight years. The Respondent here, Lee C. Swartz, as well as the Respondents who represented the Petitioners over this period of time, experienced problems representing the Novingers which resulted in their dismissal or voluntary withdrawal from the unpleasant and distrustful Petitioners.

The Respondent, Lee C. Swartz, became involved with the representation of the Petitioners by way of William T. Smith, counsel of the Petitioners at that time. On December 17, 1980, the Petitioners, Kevin Novinger and Darlene Novinger, entered into a contingent fee agreement with William T. Smith, to prosecute two civil actions as a result of their alleged personal injuries incurred as a result of exposure to certain toxic substances.

The contingent fee agreement provided for 25% received by way of settlement and 33-1/3% received after trial and verdict. On February 10, 1981, the said William T. Smith contacted Lee C. Swartz and requested that the latter participate in the two cases on behalf of the clients with any fees to be divided equally between the firms of Hepford, Swartz, Menaker & Morgan (then "Hepford, Swartz, Menaker & Wilt") and Smith and Smith, P.C.

It was agreed between Lee C. Swartz and William T. Smith that the respective firms would advance costs on behalf of the Petitioners, who were said to be indigent, and share equally in this expense.

On February 23, 1981, in the presence of William T. Smith and his associate, David E. Cole, Lee C. Swartz met with the Petitioners, Kevin and Darlene Novinger, at which time the Novingers requested that Mr. Swartz associate with Mr. Smith in pursuit of their case, and that counsel fees not be duplicated. It was further explained to the Novingers that Mr. Swartz was a

specialist in civil litigation, particularly products liability actions, and that he would take over the management strategy and become, in effect, lead counsel in the case. The Novingers fully agreed and requested that Mr. Swartz represent them under these circumstances. The team of Smith and Swartz, and their law firms, respectively, expended efforts over a period of almost two years to develop the Novinger's case, to explain to them its strengths and weaknesses and to obtain their cooperation and assistance in order to achieve the goal of just compensation for the injuries sustained. The preparation of the Novingers' case was very complex, and each service rendered was documented by detailed time records describing the service rendered and by whom they were rendered. The attorneys met with the Novingers personally on numerous occasions, consulting with them, planning the strategy in their case, preparing them for depositions and advising them with respect to medical consultants. Attorney Swartz and the firm of Hepford, Swartz, Menaker & Morgan expended the sum of \$4,902.25 in costs on behalf of the Novingers, including advancements for the payment of various expert expenses, purchase of paint samples (at the Novingers' request), investigation expenses, travel expenses, including a trip to Florida and a trip to Long Island, New York, telephone calls and photocopies. The total time expended by the firm of Hepford, Swartz, Menaker & Morgan includes 211.3 hours of time by counsel and an additional 387.9 of paralegal and law clerk time.

During the course of Swartz' experience with the Novingers, a great deal of time was taken dealing with the extraordinary problems which the Novingers' distrust generated. The Novingers displayed a continuous disrespect and distrust for the court which made it extremely difficult for the attorneys to obtain their cooperation in submitting to depositions and complying with other court orders. In addition, the Novingers refused to cooperate in the discovery process, resulting in the defendants' lack of cooperation in discovery. The continual reluctance to provide information and the growing suspicion and distrust of the representation by the Novingers greatly impeded Respondent

from preparing the case for trial. Eventually, the Novingers became so dissatisfied that they sought advice from various attorneys, without communicating directly to Mr. Swartz any desire that he withdraw as counsel or cease their representation.

The Novingers then retained Bruce D. Desfor to represent them. Mr. Desfor indicated his desire to retain Mr. Swartz in the case because of his expertise in the area, and his knowledge and development of the case and the theories of liability and damages. By the retaining of Mr. Desfor, Mr. Swartz believed and understood that the Novingers agreed that Mr. Desfor would be responsible for the supervision and management of the case to the relief of Mr. Swartz. On November 17, 1982, the Novingers signed an agreement of release releasing Lee C. Swartz, as well as William T. Smith and David E. Cole, as counsel in the case. The release was not a mutual release and did not mention compensation for reimbursements for costs advanced. Pursuant to an oral agreement between Mr. Desfor and Respondent Swartz, Swartz was to retain the responsibility of lining up experts, including medical, obtaining opinions and attempting to develop the damages aspect of the case through the experts, as well as assisting in the preparation of experts in the event of trial, and appearing at trial to work with the experts.

Finally, Mr. Desfor withdrew as counsel, and Mr. Swartz, with the permission of the court, also withdrew and after more than a year of numerous contacts with lawyers from Central Pennsylvania and elsewhere, the Novingers selected Allan Kanner to represent them.

In January 1986, relying primarily on their support of experts developed by prior counsel, including Respondent Swartz, Petitioners settled the case for an undisclosed amount which has been sealed by the court. Respondent Swartz, and Hepford, Swartz, Menaker & Morgan submitted their statement of fees and costs pursuant to the direction of Judge Rambo, U.S. District Court for the Middle District of Pennsylvania on May 11, 1984. Respondent Swartz and Mr. Smith each filed a motion for counsel fees and expenses with Judge Rambo, which was briefed and opposed by Mr. Kanner. Mr. Kanner filed a motion to file a motion and memorandum out of time (having failed to comply

with the rules of the United States District Court for the Middle District of Pennsylvania), which memorandum was replete with erroneous factual allegations unsupported by affidavits or testimony. The motion of Respondent Swartz for counsel fees and expenses was dismissed by Judge Rambo without a hearing on the basis that Swartz had released his claim. Swartz appealed the order of Judge Rambo, requesting compensation for legal services and costs advanced based on the lack of opportunity to provide testimony concerning their efforts and progress in the litigation, as well as Petitioners' own actions which impeded Swartz' ability to dispose of the case or establish that his claim was not released.

The United States Court of Appeals for the Third Circuit reversed the order of the United States District Court for the Middle District of Pennsylvania and remanded for further proceedings in order that Respondent Swartz, and other counsel for the Novingers, could present their case knowledgeably. The Court of Appeals for the Third Circuit found the decision of the District Court unsupported by the record, and found that the record, without further argument or testimony, was indispositive of the question of whether Respondent intentionally released the right to payment for the reasonable value of their services rendered.

Petitioners now petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

### SUMMARY OF ARGUMENT

Petitioners' petition for certiorari should be denied due to their failure to set forth any reasons why this Court should grant the petition. Petitioners are required to set forth the reasons for a grant of certiorari by Supreme Court Rule 21.1(j). Despite Petitioners' blatant failure to set forth any reasons for granting the writ, the petition should nevertheless be denied because Petitioners' case is not the type of case considered worthy of certiorari pursuant to Supreme Court Rule 17. There are no other

express or implied substantial, special or important reasons why this Court should grant the petition.

A review of Petitioners' case would benefit only the particular litigants of this case. Petitioners express a mere dissatisfaction with the disposition of the case by the United States Court of Appeals for the Third Circuit. This Court is not the appropriate forum for reviewing errors in decisions or in reviewing strictly evidentiary matters. The court of appeals has the discretion and the ability to review and dispose of the decision in the manner in which they chose. Due to the inability of the evidence on the record to substantiate the district court's decision, the Court of Appeals for the Third Circuit reversed the district court's decision and remanded for further proceedings.

Petitioners' petition is also inappropriate for review due to its interlocutory nature, in that the Court of Appeals for the Third Circuit remanded the case for further proceedings, as a result the case is not yet ripe for review by this Court.

Due to the lack of precision, care and clarity in the preparation of Petitioners' petition for certiorari, Petitioners have omitted the statement or the showing of any substantial or important reasons why this Court should grant review. Petitioners' petition for certiorari should be denied and the case allowed to proceed as ordered by the United States Court of Appeals for the Third Circuit.

## ARGUMENT

Petitioners, in their presentation for certiorari, offer no reasons why this Court should consider granting certiorari. Supreme Court Rule 21.1(j) requires that a direct and concise argument amplifying the reasons relied on for the allowance of the writ be specified in the petition for certiorari.

Supreme Court Rule 21.1(j), which requires the petitioner to set forth the reasons relied on for the allowance of the writ, directs the petitioner to Supreme Court Rule 17, which provides considerations governing review on certiorari. Supreme Court Rule 17 provides, in part, that review on writ of certiorari is not a matter of right, but of judicial discretion; and, writ is granted

only on the presentation of special and important reasons therefor. Rule 17 indicates the character of reasons considered:

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided the federal question in a way in conflict with the state court of last resort; or has so departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure from a lower court, as to call for an exercise of this court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with a decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided on an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court.

#### Supreme Court Rule 17.1

Petitioners' petition is lacking and unworthy of consideration on certiorari not only because of the complete failure to set forth any reasons why this Court should consider granting certiorari, but also because the substance of Petitioners' issues presented are not of the caliber meritorious of review or consideration by this high court. Petitioners failed to set forth any reasons for allowing the writ, and instead improperly argued the merits of their case. The reasons enumerated for granting the writ should not be a brief on the merits, but should show why a proper development of the law requires that the Court answer the questions proposed by the case. 2 Fed. Proc. App., Cert. and Review §3:197 (1981), *Prettyman, Petitioning for the United States Supreme Court — A Primer for the Hopeful Neophyte*, 51 Va. L. Rev. 582 (1965). Petitioners not only argue the merits of their case, but frequently and improperly misconstrue the actions, arguments and decisions below in language which borders on libel. Petitioners' petition should be stricken, if for no other

reason, for its content of impertinent, scandalous and unwarranted matter presented in an exaggerated and unprofessional fashion. *Wilks County v. W.N. Cooler and Company*, 186 U.S. 481 No. 558, 23 S.Ct. 738, 46 L. Ed. 1260 (1902); *Yellow Poplar Lumber Company v. Chapman*, 215 U.S. 601, 30 S.Ct. 451, 54 L.Ed. 344 (1909).

Petitioners seek review of the decision of the U.S. Court of Appeals for the Third Circuit. However, Petitioners offer no persuasion to this Court as to why such a review is necessary and what such a review would accomplish regarding the development of the law in the area, the resolution of any controversy, or the benefits a review would hold for the public. Petitioners fail to come within any consideration under Supreme Court Rule 17 or other appropriate consideration. The petition expresses only a dissatisfaction with the disposition of the issues resolved by the Court of Appeals for the Third Circuit, as a reason for review by writ of certiorari.

It is elementary that the only way this Court can become educated on the need to review an issue or case or to determine whether a particular case contains the requisite substantial and important reasons, is through a clear and concise petition. It is imperative then that a petition set out clear, definite and complete disclosures concerning the controversy at hand. *Southern Power Company v. N.C. Public Service*, 263 U.S. 508, 44 S.Ct. 164, 68 L. Ed. 413 (1924).

The Petitioners clutter their petition with arguments on the merits instead of with persuasive reasons. Such arguments are an exercise in futility if the Court is in no way enlightened as to whether it is a proper matter to add to their docket. In the interest of judicial economy and fairness to all litigants, only cases worthy of additional review should be granted certiorari. The Court would be decidedly overburdened if every petitioner were derelict in his responsibility to effectively set forth his contentions of merit. Unless a petition is carefully prepared, contains appropriate references to the record, and presents in an accurate, brief and clear manner, that which is essential to an adequate and ready understanding of points requiring the Court's

attention, interested parties are prejudiced and the Court is impeded in the disposal of meritorious causes. *Furness, W. & Company v. Yang-Tsze Insurance Association*, 242 U.S. 430, 31 S.Ct. 141, 61 L. Ed. 409 (1917).

Petitioners cite no need for this case to be resolved for the benefit of this area of law. Petitioners cite no conflict with any state court decision or decision in the Circuit Court on this particular issue. Petitioners cite no departure from judicial proceedings that would warrant this Court's supervision. Lastly, Petitioners cite no problems of public importance to justify review, and it is improper for a solely private dispute to be reviewed in this Court on that basis alone. This Court has consistently maintained the practice of granting certiorari only in cases involving principles, the settlement of which is of importance to the public as distinguished from that of private parties. *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed. 712, 714 (1923). Nothing in the petition heightens the Petitioners' request for review beyond anything other than a private dispute. Petitioners' petition should be denied, without further consideration, due to the failure to express any reasons why the writ should be granted.

If this Court were to look beyond the failure to expressly set forth the reasons for certiorari, no other substantial, specific or important reasons exist or can be implied for a grant of certiorari. A grant of certiorari based on grounds of substantial or important reasons is a subjective determination, but not complex. A petition should first raise and identify what the alleged substantial and important reasons are upon which the request for review is based. Secondly, the reasons raised should be concrete and real which illuminate a genuine controversy. Abstract questions presenting intellectually interesting and scholarly problems and problems tailored to particular litigants are not entertained by this Court. Specific and important reasons reach to problems beyond the academic and the episodic. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897, 901 (1955). Petitioners in the case at bar expect this Court not only to glean

whatever implied reasons they possess for the review out of the petition itself, but also expect the Court to unnecessarily review a decision based on only their individual dissatisfaction.

This Court has before commented on its dislike for passing judgment on issues of little or minor importance, such as the awarding of attorney's fees. In discussing mandatory review and the direct appeal provisions of 28 U.S.C.S. §1252, this Court in *Heckler v. Edwards*, 465 U.S. 870, 104 S.Ct. 1532, 79 L.Ed. 2d 878 (1984), stated:

If we were to adopt respondent's construction of the language, this court would be required to give precedence to issues outside the congressional definition of public importance. We would, for example, be obliged to crowd our docket with appeals concerned solely with attorney's fees awards or pendent claims arising under state law—matters that would typically fail to meet our criteria for discretionary review. See Supreme Court Rule 17. Appeals of this sort would almost certainly be better handled by the court of appeals, which is where they will lie under their interpretation of §1252 that we adopt today.

*Heckler*, 465 U.S. at 876.

Even if a petition recites a grave question of vital public importance, which Petitioners' certainly does not, if the petition reflects no more than a primarily factual argument, such as the case at bar, no grounds exist for granting certiorari. *Southern Power Company v. N.C. Public Service*, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924); *N.L.R.B. v. Hendricks City Rural Electric Corporation*, 454 U.S. 170, 176, 102 S.Ct. 216, 70 L.Ed. 2d 323, 330, Footnote 8 (1981).

Addressing Petitioner's assertion of arguments on the merits of the case, the petition presented to the Court discusses at length and argues the factual findings and the sufficiency of such findings in the decisions below. Respondent submits that the proposed arguments and requested review are improper and should be denied as improperly raised. This Court is not a place to review a conflict of evidence nor to reverse a court of appeals because of an inclination that, were this Court in its place, it

would have found the record tilting one way rather than the other, where fairminded judges could find it tilting either way. *N.L.R.B. v. Pittsburgh S.S. Company*, 340, U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951) (on writ of certiorari from Court of Appeals for the Sixth Circuit, from order of Labor Board):

It is not for us to invite review by this court of decisions turning solely on evaluation of testimony where on a conscious consideration of the entire record a court of appeals. . . finds the Board's order unsubstantiated. In such situations we should "adhere to the usual rule of non-interference where conclusions of circuit courts of appeals depend on the appreciation of circumstances which admit of different interpretations." *Federal Trade Commission v. American Tobacco Company*, 274 U.S. 543, 544, 47 S.Ct. 663, 71 L.Ed. 1193, 1194 (1927).

*N.L.R.B.* 340 U.S. at 503.

In his dissent in *Joe Gibson v. Phillips Petroleum Company*, 352 U.S. 874, 77 S.Ct. 16, 1 L.Ed. 2d 77 (1956), Justice Frankfurter (with Justice Harlan joining) stated that the Court has respected the purpose of the enactment establishing courts of appeals (1891). The court has repeatedly stated that it does not sit to correct errors, even plain errors, in a case, particularly of local controversy. "The Supreme Court of the U.S. is designed for important questions of general significance in the construction of federal law and in the adjustment of the serious controversies that arise in the federal system . . ." 352 U.S. at 875.

Petitioner's improperly review the evidentiary findings and interpretations of the decisions below. However, the Supreme Court will not grant and should not grant writ of certiorari merely to review evidence or inferences drawn from it, or to discuss specific facts. *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 58 S.Ct. 849 82 L.Ed. 1273 (1938), adhered to 305 U.S. 124, 59 S.Ct. 116, 83 L.Ed. 81, rehearing denied, 305 U.S. 675, 59 S.Ct. 355, 83 L.Ed. 437 (1939). See also *U.S. v. James J. Johnson*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925).

Just as Petitioners allege in their petition that the district court is better able to determine the facts, so too is the court of appeals better able to examine records for sufficiency of evidence. An independent review of the court of appeals review is not the function of this Court. Whether this Court agrees or disagrees with the court of appeals' evaluation of the evidence, a tolerant judgment can truly not conclude that it does not represent a fair, judicial determination. "After all, we are reviewing the judgment of the court of appeals, and it is its judgment that must be subjected to the rule of reason." *Dick v. New York Life Insurance Company*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed. 2d 935 (1959) (dissenting opinion, Frankfurter joined by Whittaker).

This Court does not, and has not reviewed or granted certiorari to consider merely the correctness of a decision. "This court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review." *Ross v. Moffitt*, 417 U.S. 600, 616, 44 S.Ct. 2437, 41 L.Ed. 2d 343 (1974, J. Rehnquist). Standing alone, this Court should not grant certiorari on the basis of correctness, and as is obvious from the petition, Petitioners do not couple this basis with any other factor of substance or importance, e.g. *Williams v. Lee*, 358 U.S. 217, 218, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959) (important question of state power over Indian affairs), *Permalife Mufflers v. International Parts Corporation*, 392 U.S. 134, 136, 88 S.Ct. 1981, 20 L.Ed. 2d 982 (1968) (decision of court of appeals affected enforcement of antitrust policy in U.S.). The petition of certiorari should be denied due to the failure of any implied substantial or important factors or reasons, beyond the complaint of an alleged erroneous decision.

In an effort to raise all objections to Petitioners' petition for certiorari, Respondent briefly addresses the merits of the case regarding Respondent Lee C. Swartz. The Court of Appeals for the Third Circuit did not overstep its scope of review in determining that, absent a hearing, the district court's reasoning was inadequate to support the dismissal, that the record and findings did not support the conclusion, or in remanding for further proceedings on an unresolved question of fact.

A court of appeals is given broad authority to review judgments and orders. 2 Federal Procedure Lawyer's Ed. §3:644 (1981), *McGraw-Edison Company v. Central Transformer Corporation*, 308 F.2d 70 (8th Cir. 1962). Given such authority, it is the court of appeals that is primarily responsible for reviewing the sufficiency of the evidence below. *Hamling v. U.S.*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed. 2d 590, rehearing denied 419 U.S. 885, 95 S.Ct. 157, 42 L.Ed. 2d 129, (1974). In the instant case, the Third Circuit found that absent a hearing to determine the remaining factual questions of the intent of the parties and the extent of the waiver agreed upon, the record is insufficient to support the district court's conclusion. The Court of Appeals held that the record does not permit the conclusion that Respondent Lee C. Swartz made no contribution to the Petitioners' fund of settlement proceeds. In addition, the Court of Appeals found the district court's decision devoid of the reasons eluded to which find the record sufficient. Thus, the district court's decision was not clearly supported by the record, which was itself insufficient to support the judgment, and clearly within the Court of Appeals' power to reverse. *Hurwitz v. Hurwitz*, 136 F.2d 796 (D.C. Cir. 1943), *Goodman v. U.S.*, 398 F.2d 879 (9th Cir. 1968). Section 2106 of the Title 28 U.S.C., Judiciary and Judicial Procedure, provides that a court of appellate jurisdiction may, among other things, reverse and remand a cause, or require further proceedings that may be just under the circumstances. Certainly, the decision and order of the Third Circuit Court of Appeals was within the purview of that statute.

Also, an appellate court can properly reverse if the evidence is insufficient to support the judgment below and an injustice has been done. *U.S. v. Ratke*, 316 F.2d 225 (6th Cir. 1963), *Colby v. Cities Service Oil Company*, 254 F.2d 665 (10th Cir. 1958), 2 Federal Practice, L.Ed. §3:696 (1981). If the Respondent is unable to adequately present his supporting evidence in this case, an injustice will be done. The Court of Appeals for the Third Circuit properly determined, without reviewing the evidence de novo, that the judgment rendered by the district court did not have a rational basis in the facts reviewed by that Court. Indeed, the Court of Appeals for the Third Circuit followed the

only proper course, because it could not determine a case where relevant evidence was wrongfully excluded by the trial court. A remand, and in this case a hearing on the excluded additional evidence is necessary and proper. *Gibson v. U.S.*, 329 U.S. 338, 67 S.Ct. 301, 91 L.Ed. 331 (1946), *Seminole Nation v. U.S.*, 316 U.S. 286, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942). An appellate court can properly request a record be supplemented or refuse to hear an appeal before the record is amplified. *Pacific Cage and Screen Company v. Continental Cage Company*, 259 F.2d 87 (9th Cir. 1958).

A recent decision in the First Circuit, *Sierra Club v. March*, 769 F.2d 868 (1st Cir. 1985) stated that where a district court simply reviews documents, and does not consider witnesses' testimony, the appellate court has greater freedom to differ with the district court's determination. The ability of the appellate court to rightly differ depends primarily on whether the district court applied and evaluated the documents with the same standard as the appellate court. The appellate court should not so readily defer to the district court's decision when the advantage of evaluating live witness testimony and/or attorney explanations are absent. In the case at bar, the District Court rendered its decision upon evaluation of written briefs of the parties. The District Court's decision should not be deferred to here because it did not utilize any evidence that the Court of Appeals could not evaluate under the same legal standards or from the same perception.

The Court for the Third Circuit properly found that as a matter of law, it could not be concluded that Respondent Lee C. Swartz made no contribution to and had no entitlement to Petitioners' fund. An appellate court may exercise independent judgment and enter its own conclusions of law. *Murphy v. Turner*, 426 F.2d 422 (10th Cir. 1970). *U.S. v. Rusmisel*, 716 F.2d 301 (5th Cir. 1983).

In another matter, the Petitioners seek review on an issue not yet ripe for review. The court of appeals reversed and remanded this case for further findings. This Court should deny this request for an interlocutory review. The lack of finality in the judgment below may "of itself alone" furnish "sufficient grounds

for the denial of the application." Robert L. Stern, Eugene Gressman and Steven M. Shapiro, *Supreme Court Practice*, page 224, §4.18 (6th Ed. 1986). *Hamilton-Brown Shoe Company v. Wolf Brothers & Co.*, 240 U.S. 251, 258 36 S.Ct. 269, 60 L.Ed. 629 (1916), *Brotherhood of Locomotive Firemen v. Bangor and Arostock Railroad Company*, 389 U.S. 327, 328, 88 S.Ct. 437, 19 L.Ed. 2d 560 (1967), *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976) (dissent of Justice Stevens).

Finally, Respondent objects and finds totally in error and irrelevant Petitioners' statutory reference, in their petition, to Title 39 U.S.C.A. §§1001 and 1001(b) (pertaining to the appointment and status of employment within the Postal Service). Respondent fails to see, and Petitioners fail to explain, what express or implied relation that statute bears to this case. Respondent can only conclude that the citation is an error, further evidencing the lack of care and precision utilized by the Petitioners in preparing their petition for writ and enumerating those elements necessary for the Court's determination of granting or denying certiorari.

### CONCLUSION

Petitioners' petition should be denied for failure to set forth or express any reasons why this Court should grant certiorari. No implied or other reasons exist which would warrant a grant of certiorari.

The ruling of the Court of Appeals for the Third Circuit which reverses the District Court's decision and remands for further proceedings to resolve a question of fact, does not present an important question of federal law unsettled by this court, or one in conflict with decisions of this Court, or a question of such public importance that it would merit review by this Court. Petitioners blatantly and expressly fail to enumerate any reasons why this Court should grant certiorari. In addition, the ability and discretion of the appeals court to render the decision it did, the interlocutory status of the case and the deficient preparation of the petition direct a denial of the petition for writ of certiorari. Based on the above stated reasons, this Court should deny Petitioners' writ of certiorari, that the case may properly and adequately be disposed per the order of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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